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## Note

# Historians Before the Bench: Friends of the Court, Foes of Originalism

**Joshua Stein\***

Historians' amicus briefs play a special role before today's Supreme Court as it grapples with the law's "original meaning."<sup>1</sup> Since 2000, professional historians have participated in forty-six amicus briefs before the Supreme Court.<sup>2</sup> Thirty-two of these came after 2006. Historians had signed only six between 1989 and 1999. In spite of their enthusiastic participation, historians are neither getting the results they would like nor

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\* Yale Law School, J.D. expected 2014; UCLA, Ph.D. (History) 2009. I am grateful to Joshua Levin and the Notes Committee of the *Yale Journal of Law & the Humanities* for editing this Note. I must also thank Linda Greenhouse for her mentorship and advice and Trevor Merrill, who read this piece countless times.

1. On originalism and its alternatives, see generally JACK BALKIN, *LIVING ORIGINALISM* (2011), which argues that originalism can be tailored to contemporaneous concerns; RANDY BARNETT, *RESTORING THE LOST CONSTITUTION: THE PRESUMPTION OF LIBERTY* (2005), which advocates for a return to the Constitution's "original meaning"; and PAMELA S. KARLAN, GOODWIN LIU & CHRISTOPHER H. SCHROEDER, *KEEPING FAITH WITH THE CONSTITUTION* 26 (2010), which puts forward an alternative to originalism the authors call "constitutional fidelity."

2. Data current as of late 2012. "Professional historians" for the sake of this Note are scholars in university history departments or legal faculty that identify as legal historians. Lawyers who write historically, but do not identify themselves as historians, were not included in this study.

using means they particularly want to employ.<sup>3</sup> This Note is directed toward historians, who I hope will continue to attempt to influence the Court, and legal practitioners, who should reconsider how they argue over the past.

Historians, I contend, can more effectively influence the Court and reclaim their authority to interpret the past without surrendering their professional principles. They must first understand that their attempts to get involved in originalist debates fall short in three ways: (1) they traffic in certitudes, which are anathema to the historical vocation; (2) they accept and legitimize the normative, originalist premise that the past *ought* to inform the present; and (3) they search for historical analogies to satisfy the Court's originalists when they are better served locating or contextualizing persuasive case law. This Note will examine these three matters in turn in Parts One, Two and Three. In Part Four, I argue that historians can and should pursue alternative approaches in their briefs. Responding to each of the three issues named above, respectively, they should (1) attack originalist arguments by destabilizing their historical conclusions, (2) adopt alternatives to originalist advocacy in their amicus briefs, or (3) craft briefs narrowly in the fashion of a historical "special master." All three approaches would bring an urgent relevancy to historical advocacy without sacrificing historical principles.

Each of these options would address the aforementioned concerns. Option one puts historians in their methodological comfort zone; they can "tell it like it is" by emphasizing the uncertainty of the past without trying to replace one erroneously certain version of the past with another. Option two makes the Constitution more of a moving target, one that shifts along with society. Option three is so fact-specific and narrowly tailored that partisan politics could be pushed aside by a focus on precedent and, to the extent possible, on facts rather than arguments. These briefs would target discrete precedential and factual questions that historians believe can help the Court decide a particular case.

Before homing in on key vulnerabilities in historical advocacy, it is helpful to first try to understand how history as used in the law is quite different from history as interpreted by a historian. William Novak has a good vantage point over this divergence. Formerly of the history department at the University of Chicago, now professor at the University of Michigan Law School, Novak observes, "[H]istories written by lawyers and historians often seem to be composed by entirely different animals—hedgehogs and foxes in Rakove's application of Isaiah Berlin's famous

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3. A "win" indicates that the party on whose behalf the amicus brief was submitted received a desirable judgment. The win-loss record is less than an even split: twenty-one wins, twenty-six losses, and four undecided. Of the mere nine briefs that earned a citation from the Supreme Court, only four of them supported the winning side, that is, were submitted on behalf of the party who won before the Court. Amicus data available upon request.

typology—after distinctly different kinds of intellectual prey.”<sup>4</sup> Novak accuses jurists of adhering to a kind of “constitutional theology” that distorts the past.

Professional historians long ago slew the Whig dragons that had generations of Americans learning to worship the “heroes” of the past at the expense of a more complete and nuanced history.<sup>5</sup> The histories that dominate the American law, both in scholarship and practice, have gone through no such fire trials. This is especially a problem with originalism.

Historians who offer originalist arguments do not typically share the philosophical zeal of legal practitioners about the legitimacy of the practice. Nevertheless, when they do jump into the fray, they often offer historical conclusions packaged in originalist terms since doing so represents a sure-fire way to contribute to legal discourse. Yet they may find their efforts blunted by the fact that originalism’s most fervent practitioners rarely find that the historical record forces them to conclude in a way that runs counter to their principles or politics.

The clearest practical distinction between a historian’s history and a lawyer’s is that the lawyer is trying to win a case. For the most part, furthermore, lawyers’ past is about precedent. And when lawyers turn to a past beyond case law, they handle history as dilettantes. Lawyers are not beholden to any vocational ethos about history and can search for handpicked facts and arguments in the history books to advance their cause. Surely attorneys should not seek victory at any cost, but they are entrusted with the responsibility of zealous advocacy. Just as they hunt for favorable precedent, so too they try to illuminate a sympathetic past. Lawyers view history as they do any other expertise hired for trial—as a tool to win. This results in a cynical view of the past that historians cannot quite abide.

Amicus briefs afford professional historians an as yet unseized opportunity to change how legal practitioners approach history. Were historians to engage the legal world over the use of history, historians could be more effective in influencing adjudication and advocating on

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4. William J. Novak, *Constitutional Theology: The Revival of Whig History in American Public Law*, 2010 MICH. ST. L. REV. 623, 626 (citing Stuart Banner, *Legal History and Legal Scholarship*, 76 WASH. U. L.Q. 37 (1998); Martin S. Flaherty, *History “Lite” in Modern American Constitutionalism*, 95 COLUM. L. REV. 523 (1995); Robert W. Gordon, *Historicism in Legal Scholarship*, 90 YALE L.J. 1017 (1981); Robert W. Gordon, *The Past as Authority and as Social Critic: Stabilizing and Destabilizing Functions of History in Legal Argument*, in *THE HISTORIC TURN IN THE HUMAN SCIENCES* 339 (Terrence J. McDonald ed., 1996); William E. Nelson, *History and Neutrality in Constitutional Adjudication*, 72 VA. L. REV. 1237 (1986); Jack N. Rakove, *Two Foxes in the Forest of History*, 11 YALE J.L. & HUMAN. 191 (1999)).

5. See WILLIAM J. NOVICK, *THAT NOBLE DREAM: THE “OBJECTIVITY QUESTION” AND THE AMERICAN HISTORICAL PROFESSION* 465 (1988) (“Formally, professional historians disparaged the teleological ‘Whig Interpretation of history,’ in which historical actors were graded according to whether they advanced or retarded the growth of liberalism and democracy.”). Novick continues to explain that in spite of this formal repudiation, Whiggish history was not killed off easily or entirely. *See id.*

behalf of a more complicated version of the past that matches their own, a past that is neither determinate nor worthy of wholesale emulation. Lawyers, judges, and legal scholars may prefer easy answers. But litigation and the law have become more and more complex. The legal world has adapted to these complexities. It can adapt to a more complicated understanding of the past too.

Such a substantial change in the use of history in the law would require a major paradigm shift. If that change comes about, the law's use of history will be better equipped to survive originalism's inevitable obsolescence. Legal theories rise and fall; this is to be expected. Rather than twist historical advocacy to fit the latest fashion, most of the approaches suggested here can find some sort of permanence by honestly hewing to historical methodologies.<sup>6</sup>

#### I. THE SECOND AMENDMENT CASES AND ORIGINALISM'S FALSE CERTAINTY

Historical study and originalist legal advocacy are at fundamental odds with one another when it comes to one key issue: certainty. But whatever their professional discomfort may have been, certainty was precisely the idiom in which the professional historians offered their conclusions in *Heller* and *McDonald*. In these, historians attempted to influence the law by dialing back their convictions that the past is often indeterminate. Yet even though historians conformed to the originalist premise of certainty, the Court still ruled against their side. This shows that something other than methodological parity was preventing the historians from succeeding—what prevented the historians from succeeding was that their results contradicted “the [justices’] own policy preferences.”<sup>7</sup>

This Part documents how historians attempted to weigh in on the past in the high-profile Second Amendment cases of *Heller* and *McDonald*. In these, they tried to tell the Court what they thought the Founders thought the Second Amendment meant. Their version of the past lost out to an account that was, unsurprisingly, able to give the Court's majority the past it needed to rule the way it wanted to. This, it turns out, should have been anticipated by historians. They know all too well how multiple versions of the past sit waiting to be exploited, making the selection of a convenient

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6. I offer two caveats on this point. First, one scholar is confident that originalism is a kind of cyclical response to constitutional flux, that its prominence waxes and wanes along with reform: “[Originalism] will reemerge, as it always has, when a political constituency issues a call for constitutional restoration following an era of constitutional flux.” Jamal Greene, *Heller High Water: The Future of Originalism*, 3 HARV. L. & POL’Y REV. 325 (2009). Second, one could make the same arguments about historians and historical theories. But the belief in an uncertain past that ought not carry normative weight came about neither swiftly nor recently. It appears to this scholar at least as here to stay.

7. Bret Boyce, *Heller, McDonald and Originalism*, 2010 CARDOZO L. REV. DE NOVO 2, 8.

one predictable. The discussion that follows explores how historians' arguments fell on the Court like arrows on tanks. But, first, it outlines why an originalist faith in certainty is so antithetical to the historical vocation.

### *A. The Only Consensus: Why Historians Reject Certainties*

Historians may attempt to be, but never quite are, neutral or objective. But one strand does tie historians together: their agreement to disagree on an existential question, which the eminent British historian, E.H. Carr, famously asked: "What is History?"<sup>8</sup> Put a hundred historians in a room and ask them that question, and you will likely get a hundred answers. Have a hundred of them study the same time period, and you will have a hundred different versions of the past.

To the extent historians do have a consensus, however, it is at odds with a central component of originalist interpretation: historians believe there is no single authoritative version of the past. And it is this essential tenet of the modern historical discipline that stands in stark contrast to the certainties in which originalist interpretations often trade. Gordon Wood, dean of early American historians, explains the historians' consensus around doubt and complexity: "The past in the hands of expert historians becomes a different world, a complicated world that requires considerable historical imagination to recover with any degree of accuracy. The complexity . . . comes with the realization that the participants were limited by forces that they did not understand or were even aware of[f]."<sup>9</sup>

Originalists believe that the Constitution should reflect the values and preferences of the founding era (or the eras synchronous with whenever a particular amendment or law was put into effect). Historians generally do not consider it possible to know with certainty what a particular group of people in a particular past would prefer. Historians live to play in the messy mud of the past. Jurists, on the other hand, need answers. Historians certainly know how to write persuasively, and will be more than happy to offer their best guess. But they generally avoid the kinds of winner-take-all debates that lie at the heart of an adversarial system.

Harvard historian Jill Lepore wrote recently that originalism is akin to "historical fundamentalism, which is to history what astrology is to astronomy, what alchemy is to chemistry, what creationism is to evolution."<sup>10</sup> "Originalism may not be good history," Gordon Wood replied, "but it is a philosophy of legal and constitutional interpretation that has engaged some of the best minds in the country's law schools over

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8. E.H. CARR, WHAT IS HISTORY? (1961).

9. Gordon Wood, *The Purpose of the Past: Reflections on the Uses of History*, 10 HIST. SPEAKING, Jan. 2009, at 2, 5.

10. Gordon Wood, *No Thanks for the Memories*, N.Y. REV. BOOKS, Jan. 13, 2011, <http://www.nybooks.com/articles/archives/2011/jan/13/no-thanks-memories>.

the past three decades or so.” As such, originalism should not be approached “cavalierly.”<sup>11</sup> Wood, ever the peacemaker, could not hope to persuade all of his colleagues to be so diplomatic. Historian Paul Finkelman, who has signed several amicus briefs, says he does not “know any serious historians that believe you can do original-intent analysis for most cases. It doesn’t work well if you take history seriously. [The past] is much too complicated. Courts don’t like complicated. They want history to prove something, and history doesn’t do that.”<sup>12</sup> Another legal historian, Peter Hoffer, believes that originalism is a recipe for misadventure: “No working historian (that is, historian teaching in a history department) credits any of the various versions of originalism, because we know how difficult it is to do the history that would substantiate such a version of interpretation.”<sup>13</sup>

### *B. Searching for a Determinate Past in the Second Amendment Cases*

The animus harbored by historians toward originalism peaked between 2008 and 2010, when the Court handed down two monumental Second Amendment decisions rooted in originalist arguments.<sup>14</sup> In these, the Court twice split five to four, rejecting arguments from prominent constitutional historians that the Framers had no intention of drafting a Second Amendment right to keep arms in self-defense.

*Heller* was conceived and delivered as a Second Amendment test case. A clash over the right to bear arms had long been brewing. With gun-rights supporters correctly sensing a shift in the zeitgeist, they seized the opportunity to win the Court’s recognition of an individual right to bear arms. Their goal in the short term was to have the Court invalidate the Firearms Control Regulations Act, which banned handguns in D.C.<sup>15</sup> Gun-rights advocates throughout the country, not just in the District, badly wanted the Court to take on the law. Not since *United States v. Miller*, in 1939, had the Supreme Court defined the limits of the Second Amendment.<sup>16</sup> The Roberts Court seemed amenable to expanding the Second Amendment beyond its stated “militia” connection to the individual use of firearms.

Six handpicked plaintiffs made up the group that would challenge the handgun ban. The eponymous *Heller* was a police officer. The *Cato*

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11. *Id.*

12. Telephone Interview with Paul Finkelman, Professor of Law, Univ. of Albany (June 19, 2012) [hereinafter Finkelman Interview].

13. Email from Peter Charles Hoffer, Professor of History, Univ. of Georgia, to Joshua Stein (June 15, 2012, 17:05 EST) (on file with author) [hereinafter Hoffer Interview].

14. *McDonald v. City of Chicago*, 130 S. Ct. 3020 (2010); *Dist. of Columbia v. Heller*, 554 U.S. 570 (2008).

15. D.C. Official Code, 2001 Ed. § 7-2507.02.

16. *United States v. Miller*, 307 U.S. 174 (1939).

Institute took the lead, filing for an injunction, which the district court soon dismissed.<sup>17</sup> In a two-to-one decision in the D.C. Circuit, Heller won, as the panel invalidated several provisions of the Act.<sup>18</sup> The District of Columbia sought an en banc hearing. When it was denied, it petitioned to the Supreme Court. Those backing the plaintiff were likely giddy at the thought of the Court taking on the case. In a five-to-four decision, the Court affirmed the D.C. Circuit decision.

Pulitzer-prize winning historian Jack Rakove and his colleagues authored an amicus brief claiming an interest in “the Court having an informed understanding of the history that led to the adoption of the Second Amendment.”<sup>19</sup> From the onset, the brief called for an originalist interpretation, asking and answering a question that would demand a “yes or no” answer rooted in historical certainties they would normally avoid in their own professional work. “The question can be elaborated and restated in this way: Did the framers and ratifiers of the Amendment believe they were constitutionally entrenching an individual right to keep arms for personal protection?”<sup>20</sup>

Rather than look solely at the Founders’ texts, the brief-writers turned toward the thoughts of the people ratifying the Constitution. It was original-intent analysis, with a twist. The brief-writers argued that, “recovering that context involves more than snatching a line from Blackstone’s *Commentaries* or Madison’s 46th *Federalist*, or ringing endless changes on the references to hunting and fowling in the *Dissent* of the Anti-Federalist minority in the Pennsylvania ratification convention.”<sup>21</sup> Instead, context requires looking at popular conceptions of the right in ratification debates. Because the Constitution’s sovereignty rests in the people’s hands, what they thought they were ratifying should matter to the Court.

Two right-leaning scholars, on the other hand, could claim victory because the side for which their brief advocated, Heller’s side, won. David Hardy and Joseph Olson submitted an amicus brief under the imprimatur of the “*Amicus Academics for the Second Amendment* (‘A2A’).”<sup>22</sup> They may not have had the resumes of Rakove and his colleagues, but they had the historical analysis that carried the majority in the Court. Hardy is an

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17. See Robert A. Levy, *Fighting for our Right to Bear Arms*, BOS. GLOBE, Mar 18, 2008, [http://www.boston.com/bostonglobe/editorial\\_opinion/oped/articles/2008/03/18/fighting\\_for\\_our\\_right\\_to\\_bear\\_arms](http://www.boston.com/bostonglobe/editorial_opinion/oped/articles/2008/03/18/fighting_for_our_right_to_bear_arms).

18. *Parker v. Dist. of Columbia*, 478 F.3d 370 (D.C. Cir. 2007).

19. Brief for Jack N. Rakove et al. as Amici Curiae Supporting Petitioners at 1, *Dist. of Columbia v. Heller*, 554 U.S. 570 (2008) (No. 07-290).

20. *Id.*

21. *Id.*

22. Brief for Academics for the Second Amendment as Amicus Curiae Supporting Respondent [Ratification And Original Public Meaning], *Dist. of Columbia v. Heller*, 554 U.S. 570 (2008) (No. 07-290) [hereinafter A2A Brief].



Arizona lawyer who has written a conspiracy-theory study of the Branch Davidian incident in Waco, Texas.<sup>23</sup> Hardy is not a trained historian, but holds a J.D. from the University of Arizona.

His counterpart was Joseph Olson. Unlike Hardy, Olson has published on legal history in academic outlets. He also co-authored an article on gun rights with Clayton Cramer.<sup>24</sup> Cramer is well known to historians of the Second Amendment for his withering attacks on the veracity of Michael Bellesiles's history of gun ownership, *Arming America*, a prize-winning book that was later discredited.<sup>25</sup> The brief aimed to establish that the "petitioners' attempt to explain the purpose of the Second Amendment misreads the historical record, mistakes the relationship between arms and militia duty, and improperly applies the very interpretative principle it invokes."<sup>26</sup> Hardy and Olson concluded that "the operative clause of the Second Amendment is as unambiguous as any command of the First Amendment."<sup>27</sup> Although most academic historians would disagree with their assessment, it lent a scholarly sheen to the arguments the Court would advance. Their brief represents the best example of what may be a trend to look out for: right-wing efforts to counter the academic mainstream.

As scholars, Hardy and Olson certainly lacked the mainstream reputations of Stanford's Rakove, who holds the intimidating title of the "William Robertson Coe Professor of History and American Studies and professor of political science and (by courtesy) law at Stanford." Nevertheless, Justice Scalia's opinion, which tracked Olson and Hardy's argument closely, was a classic example of his own brand of textual originalism. Justice Scalia's opinion advanced the argument that the Second Amendment was not limited to militia applications. The Amendment's preface, the Court held, was not intended to limit its operative second clause.

The Constitution, Justice Stevens argued in his dissent, could have included language on self-defense and hunting, as Pennsylvania's or Vermont's constitutions had, but it did not.<sup>28</sup> In a separate dissent, Justice Breyer waxed historical as he noted that gunpowder regulations in the founding era that were much stricter than trigger-lock requirements and handgun bans are today.<sup>29</sup> Justice Breyer cited several early restrictions on

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23. DAVID HARDY, THIS IS NOT AN ASSAULT: PENETRATING THE WEB OF OFFICIAL LIES REGARDING THE WACO INCIDENT (2001).

24. Joseph Olson & Clayton E. Cramer, *What Did "Bear Arms" Mean in the Second Amendment?* 6 GEO. J. L. & PUB. POL'Y 511 (2008).

25. Clayton E. Cramer, *Fraud in Michael Bellesiles's Arming America* (2001), available at <http://www.claytoncramer.com/unpublished/ArmingAmericaFraud.pdf>.

26. A2A Brief, *supra* note 22, at 41.

27. *Id.*

28. *Dist. of Columbia v. Heller*, 554 U.S. 570, 636 (2008) (Stevens, J., dissenting)..

29. *Id.* at 681 (Breyer, J., dissenting).

the right to bear arms. “The majority criticizes my citation of these colonial laws . . . . But, as much as it tries, it cannot ignore their existence.”<sup>30</sup>

Justice Scalia came out swinging against the dissenters, wielding a bludgeon whittled from history. He was determined to prove that the Stevens dissent “flatly misreads the historical record.”<sup>31</sup> After calling its textual analysis “grotesque,”<sup>32</sup> Scalia proceeded to argue that “there seems to us no doubt, on the basis of both text and history, that the Second Amendment conferred an individual right to keep and bear arms.”<sup>33</sup> Justice Scalia peppered his opinion with historical judgments. He argued, for example, that fears of tyranny forced the Framers to codify an individual right to bear arms they already thought was theirs by common law: “During the 1788 ratification debates, the fear that the federal government would disarm the people in order to impose rule through a standing army or select militia was pervasive in Antifederalist rhetoric.”<sup>34</sup>

Justice Stevens, naturally, disagreed: “[T]he drafting history of the Amendment demonstrates that its Framers *rejected* proposals that would have broadened its coverage to include [non-militia uses for arms].”<sup>35</sup> He concluded, “The history of the adoption of the Amendment thus describes an overriding concern about the potential threat to state sovereignty that a federal standing army would pose, and a desire to protect the States’ militias as the means by which to guard against that danger.”<sup>36</sup> Justice Stevens proceeded to invoke the Court’s rulings over time on the Second Amendment, concluding that “for most of our history, the invalidity of Second-Amendment-based objections to firearms regulations has been well settled and uncontroversial.”<sup>37</sup>

Many historians, like Saul Cornell, were not pleased with the Court’s use of history in *Heller*. Cornell’s explanation helps us understand why the Rakove effort failed, even though it hewed closely to the original-intent analysis favored by the Court. “It seems clear that [*Heller*] is not the triumph of a new methodology, but really just the latest incarnation of the old law office history—a results oriented methodology in which evidence is selectively gathered and interpreted to produce a preordained conclusion.”<sup>38</sup> *Heller* was a moment for pause for historians, followed

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30. *Id.* at 686.

31. *Id.* at 603.

32. *Id.* at 587.

33. *Id.* at 595.

34. *Id.* at 598. Justice Scalia asserted that the dissent ignored “the historical reality that the Second Amendment was not intended to lay down a ‘novel principl[e],’” but rather codified a right “inherited from our English ancestors.” *Id.* at 599 (quoting *Robertson v. Baldwin*, 165 U.S. 275, 281 (1897)).

35. *Id.* at 639 (Stevens, J., dissenting).

36. *Id.* at 626 (Stevens, J., dissenting).

37. *Id.* at 661.

38. Saul Cornell, *Heller, New Originalism, and Law Office History: “Meet the New Boss, Same*

soon after by another crushing blow in *McDonald*.

Gun-rights advocates, after *Heller*, grew excited at the prospect of applying recently expanded Second-Amendment jurisprudence to state and city laws. In Chicago, a group of citizens decided to sue the city over its ordinance banning handguns. They lost at both the district and circuit level. The Supreme Court took the case and focused its hearings on the key legal issue of “selective incorporation.”<sup>39</sup>

The Court has held that the privileges and immunities clause in the Fourteenth Amendment does not apply to the Bill of Rights.<sup>40</sup> Instead, a right must be “fundamental” to our system of “ordered liberty” to merit protection under the Fourteenth Amendment’s Due Process Clause.<sup>41</sup> Second-Amendment rights were fundamental, according to the majority, making them just as applicable to state as to federal law. The Court, on these grounds, struck down the handgun-ban in Chicago.

One group of legal scholars including historians John Witt and William Novak submitted a brief (one of four efforts by historians) on the history of robust Second-Amendment regulation. They avoided the strictly “legal” question of incorporation. Instead, the brief-writers detailed how, after enactment of the Fourteenth Amendment, states continued to exercise broad rights to regulate guns. “The historical record shows that states and municipalities have long enjoyed authority to enact reasonable non-discriminatory gun safety regulations, including bans on the possession of particularly dangerous classes of weapons.”<sup>42</sup> The amici offered the kind of certitudes that originalists typically employ: “It would therefore be contrary to early practice under the Fourteenth Amendment to block states and cities from enacting reasonable gun regulations.”<sup>43</sup> Contemporaneous regulations that did not raise Constitutional eyebrows then would help the Court see that similar legislation should not today do the same.

The Court disagreed, splitting five to four, just as in *Heller*. Justice Alito’s majority opinion essentially adopted *Heller*’s version of history, wherein the right to bear arms was fundamental because of the right to

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as the Old Boss,” 56 UCLA L. REV. 1095, 1098 (2009) [hereinafter Cornell, *New Originalism*]; see Saul Cornell, *Originalism on Trial: The Use and Abuse of History in District of Columbia v. Heller*, 69 OHIO ST. L.J. 625 (2008); see also Cass R. Sunstein, *Second Amendment Minimalism: Heller as Griswold*, 122 HARV. L. REV. 246 (2008); Mark Tushnet, *Heller and the New Originalism*, 69 OHIO ST. L.J. 609 (2008); Lawrence B. Solum, *District of Columbia v. Heller and Originalism*, 103 NW. U. L. REV. 923, 981 (2009) (offering perspectives on how originalism came to dominate the decision in *Heller*).

39. *McDonald v. City of Chicago*, 130 S. Ct. 3020 (2010).

40. See *The Slaughter-House Cases*, 83 U.S. 36 (1872); see also, Richard L. Aynes, *McDonald v. Chicago, Self-defense, the Right to Bear Arms, and the Future*, 2 AKRON J. CONST. L. & POL’Y 181, 185-86 (2011) (arguing that the Court misread the *Slaughter-House Cases*).

41. *Palko v. Connecticut*, 302 U.S. 319, 325 (1937).

42. Brief for Thirty-Four Professional Historians and Legal Historians as Amici Curiae Supporting Respondents at 2, *McDonald v. City of Chicago*, 130 S. Ct. 3020 (2010) (No. 08-1521).

43. *Id.* at 3.

self-defense.<sup>44</sup> The Court recited the historical conclusions from the 2008 case, arguing that the original intentions behind an individual right to bear arms evinced the importance of that right to the country's system of ordered liberty. Yet, in spite of the historical bent of the Court's analysis, which it adopted by proxy through *Heller*, the opinion did not once cite any of the four briefs historians had submitted in the case.

Justice Stevens, dissenting, denounced the majority's version of history, both in *Heller* and *McDonald*: "Justice Scalia's defense of his method, which holds out objectivity and restraint as its cardinal—and, it seems, only—virtues, is unsatisfying on its own terms. For a limitless number of subjective judgments may be smuggled into his historical analysis. Worse, they may be *buried* in the analysis."<sup>45</sup> Stevens held out his own use of history as a counterexample: "At least with my approach, the judge's cards are laid on the table for all to see, and to critique."<sup>46</sup>

*McDonald* had finally pushed the Court minority over the edge. Rather than simply fight the majority's version of history with their own, the dissent turned toward a much more nuanced tactic. Its approach to originalism now espoused the ethos of professional historians: history is neither linear nor certain.

Justice Breyer also questioned the Court's reliance upon the history, particularly given that history was not their professional expertise: "Subsequent scholarly writing reveals why disputed history provides treacherous ground on which to build decisions written by judges who are not expert at history."<sup>47</sup> Justice Breyer listed a litany of historical works critical of the history employed by the majority in *Heller*.<sup>48</sup> He also mentioned the brief by English legal historians on the misreading of Blackstone: "The historians now tell us, however, that the right to which Blackstone referred had, not *nothing*, but *everything*, to do with the militia."<sup>49</sup>

Historians themselves would likely agree with Justice Breyer; his approach points toward a future in which more jurists can discuss history with the kind of complexity historians prefer. Yet, Justices Stevens and Breyer seem to have mobilized behind the indeterminacy of historical interpretation precisely as the historians disavowed that commitment and replaced it with the certainty-talk of originalists.

To historians, who failed to triumph even when willing to play along, originalist analysis must seem like a frustrating, teleological exercise, in

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44. "Self-defense is a basic right." *McDonald v. City of Chicago*, 130 S. Ct. 3020, 3036 (2010).

45. *McDonald*, 130 S. Ct. at 3118 (Stevens, J., dissenting).

46. *Id.*

47. *Id.* at 3121 (Breyer, J., dissenting).

48. *Id.*

49. *Id.* at 3121-22 (citing Brief for English/Early American Historians as Amici Curiae Supporting Respondents, *McDonald v. City of Chicago*, 130 S. Ct. 3020 (2010) (No. 08-1521)).

which jurists never conclude anything other than what they set out to conclude. Both the *Heller* and *McDonald* decisions, Finkelman said, “are horrible on the history.”<sup>50</sup>

## II. LAWRENCE AND THE PAST’S NORMATIVE POWER

Historians may also feel uncomfortable about assigning normative power to the past to guide decisions in the present. Originalist interpretation can lead the Court and the historians who seek to persuade it to legitimize viewpoints and values that conflict with modern moralities. Accepting the premise that the past ought to inform the present is dangerous, particularly when it comes to civil rights. Using the past to deny a group its rights is to promote an insidious historical agenda. This section documents how historians sought to convince the Court that there was no original intent for laws against homosexual sodomy to stand on. I argue that in doing so historians risked anchoring rights for homosexuals to ages hostile to them.

### A. Normativity and Originalism’s Undeserved Power over the Law

Aside from his qualms about the past’s indeterminacy, Justice Stevens raised another grievance in his *McDonald* dissent: the Court should not automatically give the past normative weight in adjudication. I argue in Part Two that historians should share his concern and should tread especially carefully when attempting to locate the legal-historical foundation for civil rights in the past.

For Justice Stevens, the biggest problem with looking to the Americans of the past for answers was that they could be wrong. The Justice opined, “Some notions that many Americans deeply believed to be true, at one time, turned out not to be true . . . . The fact that we have a written Constitution does not consign this Nation to a static legal existence.”<sup>51</sup> Justice Stevens sought, it seems, to criticize the manner in which the Court attached too much importance to originalist interpretations. He continued, “[I]t makes little sense to give history dispositive weight in every case. And it makes *especially* little sense to answer questions like whether the right to bear arms is ‘fundamental’ by focusing only on the past.”<sup>52</sup>

Historians do not generally deign to pass value judgments on the past, and to extent they do, it is usually to “revise” our gauzy, celebratory accounts of heroism and progress. Originalists, on the other hand, tend to ascribe greatness to the Founders. They whitewash history by passing on the puffery of the nation’s founding myths. Historians should have serious

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50. Finkelman Interview, *supra* note 12.

51. *Id.* at 3119.

52. *Id.*

philosophical reservations with original-intent analysis for that reason alone, irrespective of their professional commitment to the indeterminacy of the past.

Historians should be further discouraged by the fact that there is no binding legal precedent for or consensus surrounding original-intent analysis. That is to say, it represents a special torment to forsake long-held professional principles for a practice that even many legal scholars and lawyers find dubious. The place of originalism in the canons of legal interpretation is not, appearances perhaps to the contrary, a settled question. Nothing in the Constitution and no major court decision from the founding era can be cited by lawyers or judges today holding that “when case law is lacking and plain text analysis falls short, thou shalt turn to pronouncements of the framers’ intent.” Justice Marshall understood this quite early on, when he wrote: “It would have been an unwise attempt to provide, by immutable rules, for exigencies which, if foreseen at all, must have been seen dimly.”<sup>53</sup> Marshall did not believe the Constitution intended “to deprive the legislature of the capacity to avail itself of experience, to exercise its reason, and to accommodate its legislation to circumstances.”<sup>54</sup>

In short, historians should be deeply mindful both of their own objections to giving the past normative weight and of the controversy and doubt swirling around original-intent analysis.<sup>55</sup>

### *B. Lawrence v. Texas and the Ghosts of Civil Rights’ Past*

No recent case better demonstrates the perils of a normative approach to the past than *Lawrence v. Texas*.<sup>56</sup> In allowing the past to speak to the present in an authoritative tone, the Court jeopardizes civil rights, for the past was not so kind. It featured, as we now know, the systemic legal subordination of marginalized populations.

In 1998, John Lawrence and Tyron Garner were arrested for engaging in consensual sex in Houston. A justice of the peace convicted them of a class C misdemeanor under Chapter 21 of the Texas Penal Code for

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53. *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 415 (1819).

54. *Id.*

55. I cannot, of course, launch into a wholesale and comprehensive discussion of the merits of originalist interpretation as a legal practice. However, my point is that historians should harbor serious concerns about allowing the past to constrain the present in this fashion. Civil rights simply do not have the best “original” track record. In my opinion, *Brown v. Board of Education* illustrates this point well. See Michael W. McConnell, *Originalism and the Desegregation Decisions*, 81 VA. L. REV. 947 (1995); Michael W. McConnell, *The Originalist Justification for Brown: A Reply to Professor Klarman*, 81 VA. L. REV. 1937 (1995). Akhil Reed Amar’s argument that the Nineteenth Amendment would have proven sufficient to strike down the Texas anti-abortion law is another example of liberal-leaning originalism worth exploring. See AKHIL REED AMAR, *AMERICA’S UNWRITTEN CONSTITUTION: THE PRECEDENTS AND PRINCIPLES WE LIVE BY* 277 (2012).

56. 539 U.S. 558 (2003)

“deviate sexual intercourse with another individual of the same sex.”<sup>57</sup> After a Texas Court of Appeals sustained the conviction and the Texas Court of Criminal Appeals denied their petition, the case rose to the United States Supreme Court on July 16, 2002.<sup>58</sup>

The responsibility for speaking on Lawrence and Garner’s behalf in the Court fell to Paul Smith, a lawyer for Jenner and Block. Smith, who is gay, served as a law clerk to Justice Lewis Powell, the deciding vote in *Bowers v. Hardwick*, the 1986 case that *Lawrence* would overturn.<sup>59</sup> Smith long wondered whether his failure to confide in Powell cost him a chance to swing his vote.<sup>60</sup> Smith argued that equal protection and due process rights, privacy in particular, guaranteed homosexuals the kind of civil liberties that laws against homosexual sodomy denied them. Smith further appealed to a rapidly developing social acceptance of homosexuality.

His argument, the winning argument, had the weight of dozens of amicus briefs documenting these developments, not least among them the work of Yale historian George Chauncey. Chauncey argued that laws against homosexual behavior were a historical aberration. The amicus brief submitted by Chauncey and his collaborators in this landmark case led to the biggest win for academic historians before the Court since *Brown v. Board of Education*.<sup>61</sup> The brief was signed by some of the most celebrated scholars of sexuality and gender in the United States.

Historians challenged two points crucial to Texas’s argument. First, they argued that same-sex sodomy, in contrast to sodomy more broadly, was not a consistent target throughout history.<sup>62</sup> Second, they contended that governmental discrimination against homosexuals only became widespread in the twentieth century.<sup>63</sup> It had peaked in the early days of the Cold War and was already on the wane. The brief sought to establish that until the twentieth century, there had been no concept of a “homosexual” as a separate class of citizens. “The phrase ‘homosexual sodomy’ would have been literally incomprehensible to the Framers of the Constitution.”<sup>64</sup>

The Chauncey brief noted that laws or proscriptions against sodomy mainly targeted heterosexuals, even married couples. Such laws essentially prohibited any kind of non-procreative sex. The historians

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57. *Id.*

58. *Id.*

59. *Bowers v. Hardwick*, 478 U.S. 186 (1986). For background information on this case, see DALE CARPENTER, *FLAGRANT CONDUCT: THE STORY OF LAWRENCE V. TEXAS* (2012).

60. CARPENTER, *supra* note 59, at 213.

61. See RICHARD KLUGER, *SIMPLE JUSTICE: THE HISTORY OF BROWN V. BOARD OF EDUCATION AND BLACK AMERICA’S STRUGGLE FOR EQUALITY* (2004).

62. Brief for Professors of History George Chauncey et al. as Amici Curiae Supporting Petitioners, *Lawrence v. Texas*, 539 U.S. 558 (2003) (No. 02-102).

63. *Id.*

64. *Id.* at 2.

argued there was no time-honored practice of discriminating against homosexuals as homosexuals. An originalist reading of the Constitution could not therefore justify laws against homosexual sodomy.

The lawyers who led the charge for *Lawrence* welcomed amicus submissions like this one. Lambda's lead attorney, Ruth Harlow, said, "Those briefs were important to show just how widespread the feeling was that these kinds of laws crossed the line."<sup>65</sup> According to Dale Carpenter, author of a case study on *Lawrence*, "This was the legal equivalent of a combined land, sea, and air assault by sophisticated twenty-first century weaponry on a ramshackle nineteenth-century edifice."<sup>66</sup>

But what if American history *were* replete with laws that targeted homosexuals specifically? Would these same historians have argued that the law was justified in proscribing homosexual sodomy in perpetuity? Adopting originalist arguments should give pause to historians who do not want to see the law of the present molded to conform with the often repressive laws of the past.<sup>67</sup> Another group of historians could, of course, counterargue that founding-era morality stood quite clear on sexual deviance. It is hard to believe that Puritans or Victorian-era Americans for that matter would be particularly bothered by laws prohibiting homosexual sodomy.<sup>68</sup> Justice Scalia's point on the history might well have been the meat of another historical brief: "whether homosexual sodomy was prohibited by a law targeted at same-sex sexual relations or by a more general law prohibiting both homosexual and heterosexual sodomy, the only relevant point is that it *was* criminalized."<sup>69</sup>

Historians might on occasion win originalist arguments framed around the premise that the past should be normative for the present; sometimes, as here, they will win big. But if historians continue looking toward the past to preserve rights in the present and future, their work could backfire. They risk accepting the legitimacy of originalist argumentation when doing so endangers civil liberties, which do not always have a great deal to lean on in America's unequal past.

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65. CARPENTER, *supra* note 59, at 86.

66. *Id.*

67. Scholars, at least those unaffiliated with originalist thinking, have not to my knowledge argued that historians risk their credibility in advancing this type of argument. See generally Ronald Kahn, *Originalism, the Living Constitution, and Supreme Court Decision Making in the Twenty-First Century: Explaining Lawrence v. Texas*, 67 MD. L. REV. 25 (2007) (exploring the so-called "Social Construction Process" at work in the opinion).

68. A historians' brief submitted in the *Windsor* case acknowledges that, while sodomy laws historically targeted non-procreative sex more broadly, "[P]uritan clergy vigorously condemned the 'unnatural uncleanness when men with men commit filthiness, and women with women,' in part because they worried that all people were subject to such temptations." Brief for the Organization of American Historians and the American Studies Association as Amici Curiae Supporting Respondent Edith Windsor at 7, *United States v. Windsor*, \_\_ U.S. \_\_ (2013) (No. 12-307) [hereinafter OAH Brief] (citing Richard Godbeer, "The Cry of Sodom": *Discourse, Intercourse, and Desire in Colonial New England*, 52 WM. & MARY Q. 259, 264-265 (1995)).

69. *Lawrence v. Texas*, 539 U.S. 558, 596 (2003).



## III. THE HABEAS CASES AND THE POWER OF PRECEDENT

This Part will show how historians in the post-9/11 habeas cases provided the Court with helpful precedential studies, on the one hand, and watched the Court ignore the historical examples offered in analyses dissociated from precedent, on the other. In the habeas cases, historians believed that the Court would need to rely upon history because the Constitution had incorporated the ancient, common-law writ of habeas corpus. Legal historians hoped to instruct the Court on the writ's scope, as it had functioned in England just before Independence. Though historians wrote on behalf of the winning party each time, only their brief in *Rasul v. Bush*<sup>70</sup> and one of four briefs in *Hamdan v. Rumsfeld*<sup>71</sup> addressed the kind of history the Court felt most at ease citing: old cases.

By focusing on precedent, these historians employed an alternative historical technique to originalist analysis for influencing the Court. Indeed, in a common-law system, binding or persuasive court rulings serve as the most apt representative of the past in adjudication. Historians should learn from the habeas cases that in constitutional litigation there is thus no more powerful tool than precedent. They are especially well-equipped to uncover older cases and explain their context to the Court. The pursuit of precedent in post-9/11 adjudication stands as a strong alternative to original-intent analysis, one that avoids the fraught nature of trying to speak with certainty about or assigning normative weight to the past.

A. *Rasul*

In December of 2001, American troops captured Shafiq Rasul, Asif Iqbal, and David Hicks in Afghanistan. U.S. forces transferred and detained them in Guantanamo.<sup>72</sup> The three petitioned for a writ of habeas corpus. Rasul and Iqbal, British citizens, and Hicks, an Australian, requested their release, along with the right to privileged communication with attorneys.<sup>73</sup> The United States District Court for the District of Columbia denied their petitions, ruling that Guantanamo Bay was not a sovereign territory of the United States.<sup>74</sup> The court held that it had no jurisdiction. So too did the United States Court of Appeals for the District of Columbia Circuit.<sup>75</sup> On April 20, 2004, two and a half years after their capture, the Supreme Court finally heard the petitioners' argument. Reversing the court below, it held that Guantanamo Bay was functionally

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70. *Rasul v. Bush*, 542 U.S. 466 (2004).

71. *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006).

72. *Rasul*, 542 U.S. at 470.

73. *Id.*

74. *Id.* at 471.

75. *Id.*

United States territory.

The historians' brief in this matter sought to clarify the reach of the writ. These historians wanted to help the Court understand the writ as the Constitution's Framers understood it. As the Court observed in *Rasul*, "Such historical evidence has long been considered by the Court as important in interpreting the writ's availability and scope as guaranteed by the Suspension Clause and federal habeas statutes."<sup>76</sup> The brief relied on pre-constitutional British law to argue that questions over sovereignty in Guantanamo should not bar habeas claims. The British writ was not contingent on total sovereignty over the land in question. Rather, "an English court's determination of whether it could issue the writ beyond the realm turned primarily on the crown's control over the territory and the ability of English judges to enforce the writ, not the particular label ascribed to the territory."<sup>77</sup>

According to the brief, the King's Bench in Westminster increasingly asserted its authority to issue writs of habeas corpus directly to persons detained in territories overseas, particularly where a territory lacked local courts capable of issuing and enforcing the writ.<sup>78</sup> Because the British exercised legal control over territories even before they had full sovereignty, they naturally saw habeas as a part of the empire's governing regime. Habeas corpus signified the rule of law and English justice. Fittingly, local courts issued some form of habeas corpus, even on behalf of non-subjects, in English-controlled territories over which the crown had not formally asserted sovereignty.<sup>79</sup>

The majority opinion, which sided with the detainees, cited the brief's central analysis at length. The Court first acknowledged that it had considered the "historical reach of the writ of habeas corpus."<sup>80</sup> Once it settled on history as the deciding factor, it adopted the same conclusions as the brief. The Court reasoned: "At common law, courts exercised habeas jurisdiction over the claims of aliens detained within sovereign territory of the realm, as well as the claims of persons detained in the so-called 'exempt jurisdictions,' where ordinary writs did not run, and all

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76. Brief for Legal Historians Listed Herein as Amici Curiae Supporting Petitioners, *Rasul v. Bush*, 542 U.S. 466 (2004) (Nos. 03-334, 03-343).

77. *Id.* at 5.

78. *Id.* at 11.

79. *Id.* at 15. The effort to outline the formidable authority of English law in quasi-English realms seems in retrospect to be the brief's most interesting device. The historians appealed to the strength of English imperialism as an analog to America's own empire. If America was as mighty as its English forbear, and its empire as vast or vaster, then even semi-sovereign territory like Guantanamo Bay should operate under American law. If the United States was looking to spread a Pax Americana around the world, then the rule of law could not be an afterthought. This argument served as a kind of legal judo. It took the opponents' credos—America is strong; America spreads freedom and democracy—and used it against them. But these sorts of thematic arguments, ones historians take pride in making in their own work, were not quite what the Court would end up applying.

80. *Rasul v. Bush*, 542 U.S. 466, 481-82 (2004).

other dominions under the sovereign's control."<sup>81</sup>

The historians had a clear path to the heart of the Court's holding, but it was a path paved by precedent, not history per se. The brief's arguments were more precedential than historical. A lawyer would be just as qualified to make these points, if not more so. Alas, the cited cases are not so easily found in online legal databases. The main utility and effectiveness of this historians' brief lay not so much in the analysis, which lawyers can do, but in the research itself. Certain topics, such as habeas corpus, lean on precedents found not in the repositories that lawyers typically access, but rather in the archive, the domain of the historian. The historians' victory in these cases can be best explained by the fact that they served less as historians and more as paralegals who were unusually nimble in finding cases from the past.

### *B. Hamdan*

A year later, another headlining habeas case originated in the United States District Court for the District of Columbia. This time, it began with a decision favorable to the petitioners.<sup>82</sup> Judge James Robertson ruled that the Government had a burden to show that the detainee, Salim Ahmed Hamdan, was not a prisoner of war. Prisoners of war had specific rights guaranteed by the Geneva Convention.<sup>83</sup> Presumptively, those jailed in Guantanamo were prisoners of war, whose rights could not be circumscribed unless the government specifically showed that they were "unlawful enemy combatants."<sup>84</sup> The D.C. Circuit disagreed.<sup>85</sup> And the Supreme Court reversed, ruling five to three (with Chief Justice Roberts recusing himself because he sat on the panel below) that U.S. courts did have jurisdiction.<sup>86</sup> The administration could not hold military tribunals without explicit congressional authorization.

Pamela Karlan had spearheaded an amicus campaign on behalf of Stanford's Supreme Court Clinic.<sup>87</sup> Robert Middlekauf, Jack Rakove, and Fred Anderson joined a group of distinguished historians who hoped to instruct the Court on the original meaning of the Vesting Clause of Article II. According to the brief, Article II did not authorize the President's actions in Guantanamo.<sup>88</sup> The Court, which did not cite the historians'

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81. *Id.*

82. *Hamdan v. Rumsfeld*, 548 U.S. 557, 557 (2006).

83. *Id.*

84. *Id.*

85. *Id.*

86. *Id.*

87. Brief for Jack N. Rakove et al. as Amici Curiae Supporting Petitioner, *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006) (No. 05-184).

88. *Id.* at 3. The brief captured a central characteristic of the Early Republic, a characteristic that historians could argue originalists approach inconsistently. The Founders did not have the people's support for expansive or broad central powers. When they advocate for a strong military and wide

brief, may have been less likely to listen to outsiders on broad questions of constitutional power. It was a history lesson that the Court probably felt it did not need.

Another brief, signed by Lawrence Friedman and other historians, offered the Barbary Wars as a founding-era analogue for the Global War on Terror.<sup>89</sup> The Barbary brief was filled with timeworn references, including first-hand correspondence on the late eighteenth-century conflict. The Barbary Wars made for an appealing point of reference for the Court. Even in dealing with pirates, whom the historians describe as stateless terrorists, the Founders believed in playing by the rules. In those days, the rules were known as the “Law of Nations.”

The brief, another exercise in originalist interpretation, wanted to make clear that the Founders did not look for excuses to reject the rule of law, even when they fought those who would happily fight dirty: “Despite the unlawful combat of their enemies, the Founders acted in accordance with international law and custom.”<sup>90</sup> The brief detailed all of the ways in which the corsairs of the Barbary Wars violated the norms of combat. It must have been tempting, the brief suggests, for the Founders to do the same. But they did not. They faced a conflict against stateless enemies who repeatedly violated international law. Nevertheless, the United States maintained its adherence to the law of nations.<sup>91</sup> The Court did not cite this brief or mention the Barbary Wars.

Only one brief managed to follow the example of precedential history from *Rasul*. In a fog of uncertain legality, the World War Two case, *Ex Parte Quirin*, stood out as one of the few cases that could guide the Court. It involved military tribunals for captured German saboteurs.<sup>92</sup> But rather than simply cite case law, the historians took the concept of precedential history further, using the tools of their trade to distinguish *Quirin* from the case before the Court. Historian Michael Belknap joined three legal scholars on a brief as experts on *Quirin*. To be clear, their argument was not neutral: “Legal historians have uncovered a wealth of information casting grave doubt on *Quirin*’s precedential value.”<sup>93</sup> The *Quirin* brief drove home the argument that “*Quirin* is poisoned precedent” and “should

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authority for the executive, originalists who seek a limited national government want to have their cake and eat it too.

89. Brief for Lawrence M. Friedman et al. as Amici Curiae Supporting Petitioner [Barbary Wars Precedent], *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006) (No. 05-184). Friedman’s known expertise is not the Barbary wars, it should be noted, but he is a pioneer in the broader field of American legal history. His name would make a clerk hesitate before sending the brief into the recycling bin. But it is worth asking whether name-dropping should become the norm in these efforts.

90. *Id.* at 1-2.

91. *Id.* at 10.

92. Brief for Legal Scholars and Historians as Amici Curiae in Support of Petitioner [Effect of *Quirin*], *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006) (No. 05-184) [hereinafter *Quirin* Brief] (citing *Ex parte Quirin*, 317 U.S. 1 (1942)).

93. *Id.* at 6.

be repudiated.”<sup>94</sup> The brief was not cited, but its authors were vindicated; *Quirin* did not play a substantial role in the Court’s opinion. Historians today would be well advised to use this brief as an example of precedential history that goes beyond locating pertinent, dusty cases and that uses historical methods to differentiate cases that the Court might otherwise cite as on point.

### C. *Boumediene*

Lakhdar Boumediene, a citizen of Bosnia and Herzegovina, was the central protagonist in the third and last of the habeas cases under consideration here. *Boumediene v. Bush* arose after Congress had passed the Military Commissions Act of 2006, which was the congressional response to *Hamdan*.<sup>95</sup> The Act approved the commissions that the executive had already established. It included language that abrogated the habeas rights of all captives, even those with petitions still pending.<sup>96</sup> Because of the Act, Boumediene’s lawyers faced the more challenging prospect of convincing the Court to invalidate a statute on constitutional grounds.

Their first significant resistance came from the D.C. Circuit. In 2007, a two-to-one decision upheld Congress’s authority to suspend habeas for Guantanamo detainees.<sup>97</sup> All seemed lost when the Court declined review later in 2007. But just a few months afterward, the Court reversed its decision and granted certiorari.<sup>98</sup>

The case drew nearly two dozen amicus briefs supporting Boumediene, including one from the American Civil Liberties Union.<sup>99</sup> Another group of historians also decided to write; they wanted to address once again the general historical circumstances surrounding the Constitution’s habeas suspension clause.<sup>100</sup> Doing so, they felt, would show the Court that Congress did not have the authority to suspend habeas through the Military Commissions Act.

After the Court’s reversal on certiorari, it was little surprise that the Court split on the merits. Writing for a five-to-four majority, Justice Kennedy wrote an originalist exposition on habeas: “[T]hat the Framers considered the writ a vital instrument for the protection of individual

94. *Id.*

95. See Military Commissions Act of 2006, Pub. L. No. 109-366, 120 Stat. 2600.

96. See *id.* § 7.

97. *Boumediene v. Bush*, 476 F.3d 981 (D.C. Cir. 2007).

98. See Anthony Clark Arend, *Supreme Court Reverses Its Decision, Will Rehear Boumediene and Al Odah*, EXPLOREGEORGETOWN (June 29, 2007, 2:26 PM), <http://blogs.georgetown.edu/?id=25463>.

99. Brief for the American Civil Liberties Union and Public Justice as Amici Curiae Supporting Petitioners, *Boumediene v. Bush*, 553 U.S. 723 (2008) (Nos. 06-1195, 06-1196).

100. Brief for Legal Historians as Amici Curiae Supporting Petitioners, *Boumediene v. Bush*, 553 U.S. 723 (2008) (Nos. 06-1195, 06-1196) [hereinafter *Boumediene Brief*].

liberty is evident from the care taken in the Suspension Clause to specify the limited grounds for its suspension.”<sup>101</sup> Once again, the question boiled down to whether the writ applied to Guantanamo. According to the Court, it did not matter that the prisoners were detained in a naval base rather than on U.S. soil. As the majority put it bluntly, “the Government’s argument that the Clause affords petitioners no rights because the United States does not claim sovereignty over the naval station is rejected.”<sup>102</sup>

After *Hamdan*, the Bush administration obtained the Congressional authorization it thought it needed to conduct military tribunals for Guantanamo detainees. The lone group of historians to submit a brief suggested that the courts were still unconstitutional. They wrote under the auspices of the Yale International Human Rights Clinic.<sup>103</sup> Scholars of the founding era felt it fell to them to detail exactly what authority the Constitution’s Framers had vested in both the Congress and the executive.<sup>104</sup> The Court’s majority even cited the brief on the key point of the writ’s applicability to extra-territorial captives. But it did not agree with the historians’ interpretation. According to the Court, its analogy to the writ’s use in India was not on point.

Although the Court may ultimately have reached the same legal conclusion as the historians, it did not agree with the analogy-laden historical interpretation that the historians offered in support of their conclusion. This effort, then, resembled what the Rakove brief had tried to accomplish in *Hamdan*. Documenting just how important the writ of habeas corpus was to those who drafted and signed the Constitution, these scholars wanted to show the Court that it should not take suspension lightly.<sup>105</sup> This brief’s conclusion—that Congress’s action “constitutes an unconstitutional suspension of the writ of habeas corpus by limiting access to federal courts by persons detained by the United States at the United States Naval Base in Guantánamo Bay, Cuba”—was adopted by the Court.<sup>106</sup>

Although the Court may ultimately have reached the same legal conclusion as the historians, it did not agree with the analogy-laden historical interpretation that the historians offered in support of their conclusion. “The Supreme Court of Judicature (the British Court) sat in Calcutta; but no federal court sits at Guantanamo.”<sup>107</sup> The Court concluded that history could not provide an exact analog: “In none of the cases cited do we find that a common-law court would or would not have granted, or

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101. U.S. Const. art. I, § 9, cl. 2.

102. *Boumediene*, 553 U.S. at 725.

103. *Boumediene* Brief, *supra* note 100.

104. *Id.*

105. *Id.* at 1.

106. *Id.* at 1.

107. *Boumediene*, 553 U.S. at 746.

refused to hear for lack of jurisdiction, a petition for a writ of habeas corpus brought by a prisoner deemed an enemy combatan[t].”<sup>108</sup>

Justice Scalia, in his dissent, took aim at the historians as well. “Despite three opening briefs, three reply briefs, and support from a legion of *amici*, petitioners have failed to identify a single case in the history of Anglo-American law that supports their claim to jurisdiction.”<sup>109</sup> Justice Scalia, like the majority, wanted cases, not history lessons.

The law of suspension itself bore a direct link to the habeas rights as they existed at the time of framing. If there was a moment for historian-authored originalism it might have been this one. However, even here, originalism fell short, as the attacks of 9/11 and the detainment in Guantanamo were both quite unprecedented. India and the Barbary Wars were “distinguishable” in the legal sense. Although the Court ruled in the habeas cases in favor of the parties for which the historians’ briefs advocated, the historians’ arguments were not dispositive for the Court’s rulings. The Justices in the majority simply decided that the legal principles underpinning habeas could not be abrogated by presidential fiat. They would have ruled the same way without the historical contributions.

Ultimately, arguing for one interpretation of history over another will always leave the law vulnerable. Precedent, on the other hand, lies squarely within the Court’s professional and institutional competence. Historians could dig up the past all they wanted, but they were not going to find anything quite like the problems that post-9/11 America confronted. It was precisely because of the particularity of the post-9/11 moment that attempts to analogize constitutionally ambiguous tactics in the War on Terror to historical situations proved futile.

#### IV. SOLUTIONS

This Part provides three suggestions for reform that track and correspond to the three areas of concern outlined above. I follow these with a set of practical proposals that should amplify the voice of historians before the Court and make their amicus advocacy more successful.

##### *A. Destabilizing Originalist History*

My first proposal speaks directly to historians’ discomfort with certainty. Historians can make their advocacy more effective—and more in line with their professional methodology—by using alternative (rather than definitive) versions of the past to destabilize originalist argumentation. Briefs intended to destabilize originalist interpretations of the past should not fight fire with fire. Historians should not counter an

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108. *Id.*

109. *Id.* at 847.

overly certain and inevitably partial version of the past with one that is equally certain and just as partial. Instead, they should seek to undermine a fundamental assumption on which originalists stand: that a single past awaits discovery.

Most of the briefs I have reviewed in this Note employed the “destabilizing” strategy to varying degrees. At least superficially, there is not much difference between advancing an alternative interpretation simply to dispute the historical accuracy of an opposing one and a brief that offers an alternative, but definitive interpretation meant to replace it.

But it is more than a semantic distinction. Historians who believe that originalism’s claim to historical certainty is suspect can employ historical advocacy to discredit it. They can also show the Court and the legal community that professional historians have more than vague, philosophical misgivings about law office history. A careful, concrete exploration of the past that reveals a plausible alternative interpretation is itself a rebuke of the originalist presumption that there existed in the past one single original intent that we, in the present, can identify with certainty. As such, it is more than another, independent original-intent argument. Historians should even consider making this point explicit in the brief itself. In doing so, they would argue not that their interpretation of events is the right one, but rather that because theirs is equally credible, the Court should not rest its decision on a historical misconception.

Although I earlier admonished historians by way of the *Lawrence* example, I believe historians can learn from their experience in that case. By focusing much more on demolishing their opponents’ originalist conclusions rather than merely proffering their own, they showed how historians could have a voice before the Court that does not contradict their professional ethic. Writing a brief on this tack, however, is easier said than done. The historians in *Lawrence*, for example, had the advantage of a published Supreme Court opinion that they felt got its history wrong.

Their criticism of *Bowers* did not go unrecognized by the author of *Lawrence*, Justice Kennedy. In diagramming what was wrong with *Bowers*, Kennedy explained: “[T]here are fundamental criticisms of the historical premises relied upon by the majority and concurring opinions in *Bowers* . . . . [T]he following considerations counsel against adopting the definitive conclusions upon which *Bowers* placed such reliance.”<sup>110</sup> Justice Kennedy adopted the viewpoint of the historians who submitted their brief: because the past could not be ascertained with certainty, the Court could not allow *Bowers* to deny a minority group its civil rights, particularly because the reasoning in that case relied upon certainty.

The opinion concludes: “In summary, the historical grounds relied upon

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110. *Lawrence v. Texas*, 539 U.S. 558, 567-68 (2003).



in *Bowers* are more complex than the majority opinion and the concurring opinion by Chief Justice Burger indicate. Their historical premises are not without doubt and, at the very least, are overstated.”<sup>111</sup> Once the history was found to be wrong, *Bowers* was left with nothing to stand on. The case helps us understand today the difference between writing an originalist brief and writing a brief that destabilizes originalism. The latter serves as an assassin’s bullet. Rather than replace one speciously confident perspective on the past with another, it seeks simply to introduce enough uncertainty to the discussion to keep bad history from supporting a bad decision.

The historians in *Lawrence* successfully engaged their opponents by attacking their originalist conclusions about history. They succeeded largely because they had broken down their opponents’ historical logic, not because they proved that the past was kind to homosexuals. Justice Kennedy recognized this when he wrote, “history and tradition are the starting point but not in all cases the ending point of the substantive due process inquiry.”<sup>112</sup>

The destabilizing route will be available to historians in nearly any case because the past is so tough to wrangle into a linear narrative. This is knowledge hard won by historians as a collective and something each individual historian has learned on his or her own, too. The past is quicksilver; if a case or issue hangs by a single strand of interpretation, a historian can always find a way to undercut it. In a particularly thorny or high-profile case, it may be possible to shake the confidence a swing Justice has placed in a particular perspective on the past.

### *B. Rejecting the Normative Weight of the Past Through “Constitutional Fidelity”*

The fact that historians may not want to give the past normative weight, an issue I examine in Part Two, gives them an opening to pursue a bolder type of advocacy. Rather than be handcuffed, as originalists are, by the judgments and attitudes of people long since dead, some historians might prefer to identify change over time in search of more contemporaneous constitutional interpretations.

In so doing, historians can adopt alternatives to originalism such as “living constitution” analysis or “constitutional fidelity.” The second should be especially intriguing to them. Pamela Karlan, along with California Supreme Court Justice Goodwin Liu and Christopher Schroeder, define constitutional fidelity, which they present as an alternative to originalism, as follows: “Fidelity to the Constitution requires

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111. *Id.* at 571.

112. *Id.* at 572 (quoting *County of Sacramento v. Lewis*, 523 U.S. 833, 857 (1998) (Kennedy, J., concurring)).

judges to ask not how its general principles would have been applied in 1789 or 1868, but rather how [they] should be applied today in order to preserve their power and meaning in light of the concerns, conditions and evolving norms of our society.”<sup>113</sup> A constitutionally faithful brief would advance arguments rooted in the notion that the United States Constitution should be conceptualized not only according to the letter of the law but according to its spirit too.

Historians could highlight constitutional principles as they have shaped the country since its founding and as they apply to particular issues. They can research and document constitutional trends and the social and political changes that moved them. Take the Commerce Clause, for example. A historian, particularly an economic historian, could trace the transformation of the American economy to help us understand how today’s version of the clause could be more faithful to its original spirit. There are many developments the Founders could not have foreseen. A history of these changes might seek, for example, to help the Court understand why marijuana grown in a backyard is part of a stream of commerce that is within the Constitution’s purview.<sup>114</sup> The reach of the Commerce Clause may have grown along with the economy, but the principle underlying it, historians could try to demonstrate, has remained faithful to the Constitution.

Historians who spurn originalism in favor of alternative interpretative schemes in their briefs might ask not what Thomas Jefferson would do, but what he would have done had the historians of today explained to him history’s unfolding. Such briefs would allow historians who are interested in advocacy to put their perspective on the public record. But rather than speak to original intent, historians could show how much the country and the Constitution have changed since the eighteenth century. This approach, more in line with the historians’ professional worldview, would afford the Court an opportunity to better understand what within the law has stood steadfast. Even if the bench proved uninterested, these histories could serve as a kind of “past in exile.” Historians can approach them as Judges do dissents, hoping one day for their arguments to become authoritative. For the time being, these arguments can serve as a running, open letter objecting to the way originalists see the Constitution’s past and present.

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113. KARLAN, LIU & SCHROEDER, *supra* note 1, at 26. Jack Balkin’s views on the Constitution also represent an option that fits better with the Weltanschauung of historians. “[Balkin] argues that the Constitution’s legitimacy derives from a historical process of continual popular commitment to see in the Constitution the possibility of redeeming the document’s own promises of a more just society.” Michael Dorf, *The Undead Constitution*, 125 HARV. L. REV. 2011, 2012 (reviewing JACK BALKIN, *LIVING ORIGINALISM* (2011)).

114. *Gonzales v. Raich*, 545 U.S. 1 (2005).

### C. *The Special Master Approach*

In order to address the third problem area for historical advocacy, that historians are much more effective when they focus on precedent, I offer this proposal: historians can narrow the focus of their amicus briefs to precedential or factual matters, eschewing outright advocacy as much as possible. The best way to conceptualize such an approach is to imagine historians as “special masters.”<sup>115</sup> The questions present in a Supreme Court case are likely to be different from those in a historian’s prior research. Given that reality, Peter Hoffer believes historians can be appointed just as special masters might be.<sup>116</sup> As such, they could submit their interpretations or recommendations directly to the Court.<sup>117</sup>

If the Court had narrowed its historical inquiry to a question of fact—the percentage of households owning guns in the first twenty years of independence, for example—a special master could be afforded the time and resources to investigate and return with an answer. Matthew Festa agrees with Hoffer,

The best practice for courts would be to use court-appointed historical experts in addition to—but not to the exclusion of—those proffered by the parties. Additionally, lawyers and judges . . . who give due attention to historians’ methods will have a substantial advantage in offering, countering, analyzing, or evaluating historical evidence.<sup>118</sup>

The Court could also create a new institution of historical research, akin to the Congressional Research Service, to make this a reality. But rather than wait for this unlikely event, historians can assume the role of special masters voluntarily by submitting amicus briefs that are narrowly tailored and at least on their face fact-driven and neutral.

There are three types of briefs that fit the bill, the first two of which follow the more successful precedential histories historians offered in the habeas cases. First, historians can, as in *Rasul*, submit a brief that brings to the Court’s attention older cases that might be persuasive, cases the Court might otherwise not have found. Second, historians can submit case-specific briefs that attempt to contextualize a case that could prove central to a particular matter. Take the *Quirin* example from *Hamdan* above.<sup>119</sup> That brief offered the historians’ perspective on a case they believed would factor heavily into the Court’s decision. Or, third, historians can try

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115. This idea came from the Hoffer Interview, *supra* note 13. See FED. R. CIV. P. 53.

116. Hoffer Interview, *supra* note 13.

117. See PETER CHARLES HOFFER, PAST IMPERFECT: FACTS, FICTIONS, FRAUD AMERICAN HISTORY FROM BANCROFT AND PARKMAN TO AMBROSE, BELLESILES, ELLIS, AND GOODWIN, 125-26 (2007).

118. Matthew J. Festa, *Applying a Usable Past: The Use of History in Law*, 38 SETON HALL L. REV. 479, 552 (2008).

119. *Quirin* Brief, *supra* note 92.

to uncover helpful, admittedly extrajudicial, historical facts, such as the example of gun ownership I mentioned above.

A purely “neutral” effort is not exactly en vogue in amicus briefs, which are meant to favor one party. Moreover, it may never be possible to divorce “facts” fully from the conclusions that those facts are meant to support. I argue here only that historians might try to zero in on narrow precedential or factual questions. These first steps toward a “neutral” alternative represent a humbler approach that could make historians more sanguine about writing briefs and make their brief-writing efforts more effective. Perhaps most importantly, such an approach would keep historians from having to declare that a law has a definitive original meaning. Instead, they would provide the Court, as best they can, with “just the facts.”

#### *D. Strategic Enhancements*

Historians can also consider pragmatic improvements to make their briefs more effective before the Court. Anyone who wants the Court to judge the past in a more honest, considerate, and comprehensive way would want historians to have at least some say before the Court. Historians who harbor such hopes themselves can adopt these small measures to give them more clout before the Court.

##### *1. Coordination*

As of now, the practice of amicus brief writing seems more or less spontaneous. Law school clinics or law firms can draft legal scholars into submitting a brief. But there is no systematic process for selecting the best historians for the job or the best issues for involving them. Moreover, there is no oversight to keep the process as transparent as possible. A committee within the American Society for Legal History, for example, could direct historians’ efforts. The American Bar Association, itself responsible for many briefs, would serve as a good model. An amicus brief submitted by the Organization of American Historians in the *Windsor* case can point the way forward.<sup>120</sup>

##### *2. Expertise*

Historians should also try signing their names only when they have had a real opportunity to weigh in on the content and when the final product does not contradict their research. Briefs are not and should not be mere “petitions.” Saul Cornell advises his colleagues not to “sign briefs you

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120. See OAH Brief, *supra* note 68. The brief avoids original-intent analysis in favor of providing the Court with helpful historical context on discrimination against homosexuals. It is a model worth emulating for this reason as well.

don't read closely and . . . in fields far afield from your research and core teaching fields."<sup>121</sup> Rakove puts a similar sentiment a bit more colorfully: "Everything you should do should be consistent with your scholarship; you don't want to become a constitutional hooker, so to speak."<sup>122</sup> Finkelman likewise warns, "Don't sign off on some law office history that some law firm put together."<sup>123</sup> The end goal: every historian's brief would come from true experts. Were this true, any law clerk who picked one up from the tall stack of briefs would know the product had been thoroughly and thoughtfully researched. Regardless of whether this makes briefs better, or more honest, it could, at least in this way, make them more effective.

### 3. *Cert Stage Briefs*

Historians are most likely to tip the scales at the certiorari stage. "It is generally understood now that amicus briefs are more valuable at the cert stage than at the merits stage," says Jonathan Hacker, an O'Melveny & Myers partner in D.C. who co-chairs the National Association of Criminal Defense Lawyers Committee that decides on amicus filings.<sup>124</sup> "They have a strong signaling effect on the Court."<sup>125</sup> These days, the likelihood of landing on the Court's shrinking schedule is so small, that finding a place on its docket is a triumph in its own right.

## CONCLUSION

Scholars have not held back their quills trying to understand, explain, and explore originalism and its role before the Court. They have largely focused on how the Court has gotten history wrong,<sup>126</sup> or tried to understand how it became such a powerful force in Court precedent.<sup>127</sup> They have not yet, however, reached a consensus on how historians should engage the Court and how it, in turn, should use history.

This Note seeks to start constructing that consensus around principles

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121. Email from Saul Cornell, Professor of History, Fordham Univ., to Joshua Sten (June 22, 2012, 07:47 EST) (on file with author).

122. Email from Jack Rakove, Professor of History, Stanford Univ., to Joshua Stein (June 15, 2012, 14:08 EST) (on file with author).

123. Finkelman Interview, *supra* note 12.

124. Tony Mauro and Marcia Coyle, *To Get on the Argument Docket, it Helps to Have Friends*, NAT'L L.J. (July 28, 2010), <http://www.law.com/jsp/nlj/PubArticleNLJ.jsp?id=1202463990959>.

125. *Id.*

126. See, e.g., Cornell, *New Originalism*, *supra* note 38 (impugning the use of history by originalists).

127. See, e.g., Reva Siegel, *Dead or Alive: Originalism as Popular Constitutionalism in Heller*, 122 HARV. L. REV. 191 (2008); see also Saul Cornell, *The People's Constitution vs. the Lawyer's Constitution: Popular Constitutionalism and the Original Debate Over Originalism*, 23 YALE J.L. & HUMAN. 295 (2011) (arguing that "contemporary political preferences are shuffled around and made to appear to be part of an original meaning").

that are central to the professional practice of history. It speaks to historians, who can reinvigorate their efforts while refocusing them around arguments that are true to their convictions about the past. It also aims to raise a greater awareness among legal practitioners that their handling of the past is, and will continue to be, under assault by professional historians. Should they (judges especially) so choose, they can change their approach on principle alone. Alternatively, they might, for instrumental reasons, consider that a new perspective on history may help them win some legal arguments.

Many historians do not want to be confused with advocates. Stanley Katz, for one, proposes that historians should be careful about putting their name behind out-and-out advocacy: "I don't have many suggestions, other than to remind historians that they need to check their judicial politics at the door and give Clio their best shot."<sup>128</sup> Jane Larson and Clyde Spillenger, in their handwringing over historians' efforts before the Court, went so far as to ask, "Is a legal brief what historians should do?"<sup>129</sup>

Katz argues that briefs, done carefully, can preserve historical fidelity: "[C]ourts who use historical knowledge [or] arguments ought to use history accurately and responsibly, avoiding if possible the 'lawyer's history' . . . . Our job is to provide the Court with the best historical knowledge availabl[e]."<sup>130</sup> Katz nevertheless fears that historians' work will be abused by a Court that does not care much about historical integrity: "My guess is that [history] is, alas, most important for those judges who want to buttress an otherwise weak interpretation and for whom, therefore, history may be their best argument."<sup>131</sup>

Historians will, I hope, press ahead in their efforts regardless of the thorniness of the endeavor or the small likelihood of having an impact.<sup>132</sup> They can use their expertise in a direct and powerful way to serve the public good. The amicus brief is a great vehicle for scholars who want to do so. But facing apathy, or worse, as the likeliest reward for their efforts,

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128. Email from Stanley Katz, Professor in Public and International Affairs, Princeton Univ., to Joshua Stein (June 25, 2012, 14:10 EST) (on file with author) [hereinafter Katz Interview]. In Greek mythology, Clio serves as the historians' muse and serves today as a symbol of historical integrity and honesty.

129. Jane E. Larson & Clyde Spillenger, *"That's Not History": The Boundaries of Advocacy and Scholarship*, PUB. HISTORIAN, Summer 1990, at 33, 36.

130. Katz Interview, *supra* note 128.

131. *Id.*

132. It is, I believe, a particularly opportune moment to consider how historians attempt to leave their mark on jurisprudence as law professors, who are much more frequent advocates before the Court, are also rethinking their brief-writing methods. Legal scholar Richard Fallon recently urged his colleagues at law schools to adopt a more cautious approach to amicus briefs. He suggests a few guidelines, such as submitting briefs that do not advocate for a particular side but instead serve an illustrative or expositive purpose. Richard H. Fallon, Jr., *Scholars' Briefs and the Vocation of a Law Professor*, 4 J. LEGAL ANALYSIS 223 (2012). *But see* Amanda Frost, *In Defense of Scholars' Briefs: A Response to Richard Fallon* (Jan. 2, 2012), available at <http://ssrn.com/abstract=1978337> (arguing that the standards of academia should not apply to briefs).

historians may find it difficult to continue submitting briefs.

The fact is that historians can never control the use of history by courts, not to mention the public at large. They face a situation similar to that of professional scientists who compete with armchair experts every day in the public debate over climate change. Scientists press onward in spite of this vexing reality; so, too, should historians. Simply because histories exist outside of their control ought not license historians to surrender.

This Note highlights alternatives to originalist advocacy that can free historians from many of these frustrations. Just because historians' briefs may not tell us the law's original meaning does not mean it is time for historians to go gently into the night. Historians may be fallible and political. But they are a resource. Their ability to do archival research, to tease out larger trends, and, most of all, to offer diverging, discordant views of the past can make them extremely useful to the Court and to the country.

To be sure, the tools of history are different from those of the law. Historians appreciate a past that is untidy and complicated; jurists hope to identify a single, correct result. Historians do not like using the past to pass judgment on the present; originalists think doing so is essential. I agree with Neil Richards, who tackled this issue more than fifteen years ago, concluding that history cannot and should not have all of the Court's answers. According to Richards, "When history is ambiguous, the Court should use some other method to decide its cases and not try to ask questions of the past that the past cannot answer."<sup>133</sup>

Nevertheless, historians want history to be useful. But historical advocacy before the Court should not come at the cost of reproducing the errors of originalists, that is, of pushing the Court to see the past as more simplistic than it is (or was) and of urging the Court to view the past as the definitive normative guide for the present. Rather, by correcting these ways in which originalists misuse history, historians can maintain a continuing relevance before the Court. They can also push those in the legal world to see history as they do.

The historical past should not always play an important role in legal decisions, especially not when text or precedent suggest a clearer path. But when the past does figure in a decision, the Court should welcome input from professional historians. Likewise, historians should feel that they can meaningfully contribute beyond speaking to original intentions. Within the framework suggested in this Note, historians can pursue a strategy that suits their profession and puts their versions of the past on the public record. Whether the Court listens is and always has been its prerogative. Be that as it may, members not only of the bench but also of the bar lose

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133. Neil M. Richards, *Clio and the Court: A Reassessment of the Supreme Court's Uses of History*, 13 J.L. & POL. 809, 891 (1997).

something of value if historians bow out of amicus advocacy altogether. If jurists are willing to listen to and engage with historians, even without always agreeing with them, then the legal community will benefit from a deeper, richer understanding of the past.



